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POWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERROGATE. — In the course of an investigation instituted in pursuance of one of its resolutions, the Interstate Commerce Commission interrogated the defendant with the object of ascertaining whether the directors of the U. P. railroad had expended its funds while the defendant was an officer of that corporation in buying stocks at wrongfully inflated prices or stocks that should not have been purchased. Upon his refusal to answer these interrogatories the commission sought the aid of a federal court, which directed him to answer.

Interstate Commerce Commission v. Harriman, 157 Fed. 432 (Circ. Ct., S. D. N. Y.). A preliminary consideration¹ is whether the commission has been given power to propound these interrogatories. In view of the broad terms of the Interstate Commerce Act² and of the Supreme Court's construction that it endows the commission "with plenary administrative power to supervise the conduct of carriers, investigate their affairs, their accounts, . . . and generally to enforce the provisions of the act,"³ this must be decided in the affirmative. The more fundamental consideration is whether Congress itself could constitutionally press these interrogatories, since otherwise its delegation to the Commission would be futile. The inquisitorial power of legislative bodies has received but little consideration. The importance to such a body of the ability to gather information before acting, is readily apparent. Necessity seems to have established the power and

¹ Whether these interrogatories were pertinent to the inquiry defined by the resolution is not considered, since any difficulty on this score can be obviated by a differently worded resolution.

² 24 Stat. at L. 379; amended 34 Stat. at L. 584.

³ Texas, etc., Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 438. See also *Interstate Com. Com. v. Brimson*, 154 U. S. 447; *Same v. Cincinnati, etc.*, Ry., 167 U. S. 479, 506; *Same v. Baird*, 194 U. S. 25, 41.

determined its extent — a legislature may conduct an investigation, which includes interrogating, but only to aid it in the performance of a constitutional function.⁴

The court apparently believed that Congress in two ways could constitutionally legislate on the subjects concerning which the defendant was directed to testify, and both involve points embarrassing because of difficulty and of novelty. One was that Congress could limit the interstate operations of corporations whose funds were not handled as Congress desired.⁵ This is difficult to support. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed."⁶ It is not necessarily fatal that the rule takes the form of a prohibition,⁷ or that Congress' hope is to attain thereby some other object within its power.⁸ But "manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated";⁹ that is, it must do more than merely indirectly affect interstate commerce. To keep corporations out of interstate commerce because of the way their funds are invested, seems directly to regulate corporate finance, and indirectly to affect interstate commerce. It would be very close to what the court, quoting from the Employers' Liability Cases,¹⁰ properly admits Congress cannot do — control the general conduct and business of persons engaged in interstate commerce. The distinction here sought to be drawn may clearly be seen in the many cases upholding state statutes merely indirectly affecting interstate commerce and not regulating it. The other method suggested by the court was that Congress might regulate the capital as an instrumentality of interstate commerce. The argument for this method is that the capital is wealth appropriated to carry on interstate commerce, and without it interstate commerce could not be conducted; therefore the capital is an instrumentality of interstate commerce, and the courts have laid it down broadly that the power of Congress extends to all instrumentalities. But this would not apply to the investment of all corporate funds.¹¹ Also, the regulation of these instrumentalities should refer directly and substantially to the conduct of interstate commerce. No help can be derived from the federal police power, since neither the morals, safety, nor health of the community is at stake.¹² It is submitted that the interrogatories might have been sustained because of the power of Congress to prevent combinations or devices

⁴ See *People v. Keeler*, 99 N. Y. 463; *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661; *Interstate Com. Com. v. Brimson*, *supra*; *Wilckens v. Willet*, 1 *Keyes* (N. Y.) 521, 525.

⁵ In support of this view, see Report of Commissioner of Corporations, Dec. 1904, 43, 49.

⁶ *Marshall, C. J.*, in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 196.

⁷ *United States v. Brigantine* "William," 2 *Hall's Am. L. J.* 255; *The Lottery Case*, 188 U. S. 321.

⁸ Congress so used the taxing power. See *Veazie Bank v. Fenno*, 8 *Wall. (U. S.)* 533.

⁹ *Adair v. United States*, 208 U. S. 161, 178. See also *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Employers' Liability Cases*, 207 U. S. 463, 495; *Mr. Victor Morawetz et al.* 17 *HARV. L. REV.* 533; 20 *HARV. L. REV.* 499; *Prentice, Federal Power*, 53 *et seq.*, 219 *et seq.*

¹⁰ 207 U. S. 463, 502, 505.

¹¹ The court apparently overlooked the fact that the funds in question were the proceeds of a bond issue. Its reasoning, however, might be applicable to these funds.

¹² *The Lottery Case*, *supra*; 20 *HARV. L. REV.* 658; *Freund, Police Power*, § 66.

in restraint of interstate commerce,¹⁸ and on a line of reasoning that, since Congress may regulate rates of interstate railroads, it is entitled to have full particulars as to the corporation's assets and liabilities in order that it may properly exercise this function. Also, if the directors acted unconscionably, the corporation's right to recover any profits they thereby realized might be considered an asset.

RETENTION OF JURISDICTION AFTER TERMINATION OF RECEIVERSHIP.—One of the difficulties incident to the concurrent jurisdiction of federal and state courts appeared recently in the case of a federal receivership where the court imposed on the buyer of the property the duty of paying all claims against it, reserving to itself jurisdiction over all such claims. A decision of the Supreme Court now holds that a state court was without power to foreclose to satisfy one of these claims. *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 38. This result does not rest on a doctrine of constructive possession of the *res* by the federal court after the sale, nor involve any extension of federal jurisdiction. When a *res* is subject to the concurrent jurisdiction of two courts and one of them takes actual possession, as regards questions involving the possession, it is in effect removed from the territory of the other court.¹ While one court has possession it is no more within the power of the other to determine rights in the *res* than it is within the power of a court of one state to determine interests in land lying in another state. This rule goes to the extent of saying that a sale made by order of the second court would pass no title.² But the exclusiveness of control ends when actual possession ends.³ In the case under discussion the property was subject to several junior mortgages and alleged equitable liens. None of these gave any legal interest in the property; at most they were only rights to be paid out of the proceeds of the property according to priority after judicial sale.⁴ When such a sale is made without fraud and under the supervision of the court, for the express purpose of getting the entire proceeds of the property so as to pay off the claims, these equitable rights in the property are exhausted and holders have left their claims as creditors against the proceeds. This is true whether they were parties to the foreclosure or not, for the court can compel the appearance of all who claim an interest in the property,⁵ and if they cannot be found, can adjudicate their rights after service by publication.⁶ The result is that the court can sell the property for its full value free from all such equitable liens, and will distribute the proceeds among those entitled. This fund being in the actual possession of the court, no other court can adjudicate claims against it.

The sale, however, need not be for cash, and was not in this case. Part of the consideration may be the assumption by the buyer of the express duty to pay certain claims as their validity is established. This obligation being estimated by the buyer, he may bid in the property for what he will

¹⁸ *Northern Securities Co. v. United States*, 193 U. S. 197; *United States v. Joint Traffic Ass'n*, 171 U. S. 505.

¹ *In re Tyler*, 149 U. S. 164. See 17 HARV. L. REV. 196; 21 HARV. L. REV. 279.

² *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *Walling v. Miller*, 108 N. Y. 173.

³ *Walker v. Flint*, 7 Fed. 435; *Logan v. Greenlaw*, 12 Fed. 10.

⁴ See *Perry v. Board of Missions*, 102 N. Y. 99; *Jones, Liens*, § 28.

⁵ *Farmers' Loan Co. v. Houston & T. C. Ry. Co.*, 44 Fed. 115.

⁶ *Goodman v. Niblack*, 102 U. S. 556.